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Contempt of Court

By Honorable Fletcher Bowron, *Judge of the Superior Court, County of Los Angeles*

In his essay, "Of Judicature," published in 1625, Francis Bacon wrote: "The place of justice is an hallowed place; and therefore, not only the bench, but the foot-place and precincts and purprise thereof ought to be preserved without scandal and corruption."

The "foot-place" (lobby) and "purprise" (enclosure) of courts of justice were being protected then as now, against scandal and corruption through the exercise of the power of the courts to punish for contempt. The authority to punish for contempt is as old as the courts themselves. Blackstone, in his *Commentaries,* says: "Laws without competent authority to secure their administration from disobedience and contempt would be vain and nugatory. A power, therefore, in the supreme courts of justice to suppress such contempts by an immediate attachment of the offender results from the first principles of judicial establishments and must be an inseparable attendant in every superior tribunal. Accordingly, we find it actually exercised as early as the annals of our law extend."

The constitutions of the United States and of the several States in creating the courts vested them with the power to punish for contempt, and the Legislature has no authority to take it away, for to do so would defeat the system of checks and balances of the three departments of government, which is the underlying theory or principle of government in this country.

It was said by the Supreme Court of the United State (Ex parte Robinson, 19 Wall. 505):

> "The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders and writs of the courts, and consequently, to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed with this power."

An excellent expression, by the Supreme Court of this State, of the theory, objects and purposes of the law relating to contempt is found in the leading case in California (In re Shortridge, 99 Cal. 526):

> "No authority has been found which denies the inherent right of a court, in the absence of a limitation placed upon it by the power which created it, to punish as a contempt an act—whether committed in or out of its presence—which tends to impede, embarrass or obstruct the court in the discharge of its duties. It is a doctrine which is admitted in all its rigor by the American courts everywhere, and does not need the support of foreign authorities based upon the fiction that the majesty of the king, represented in the persons of the judges, is always present in the court. It is founded upon the principle which is coeval with the existence of the courts, and as necessary as the right of self protection—that it is a necessary incident to the execution of the powers conferred upon the court, and is necessary to maintain its dignity, if not its very existence. It exists independent of statute. The legislative department may regulate the procedure and enlarge the power, but it cannot, without trenching upon the constitutional powers of the court and destroying the autonomy of that system of checks and balances, which is one of the chief features of our triple-department form of government, fetter the power itself. * * * Although the power is necessarily an arbitrary one to a great extent, it has been exercised by the court, in this country at least, only as an auxiliary means to attain the ends of justice. If abused by the judges at all, it has been only in the rarest instances. No one has realized more than the judges themselves the fact that a court cannot coerce the respect of the people for itself or its decisions and the very delicacy of the power has proved to be a safeguard against its abuse. To this alone must be attributed the fact that, although the inherent power referred to has been claimed and exercised by the courts of this country since the organization of the government, the framers of the constitution in all the States of the Union, except Georgia and

Louisiana, have deemed it unnecessary to place any limitation upon the power of their courts to punish for contempt."

This is not intended to be a discourse on substantive law, but rather a discussion of procedure in contempt matters. What acts or omissions do or do not constitute contempts of judicial authority will not be considered at length. However, in passing, I desire to give two brief quotations from California cases, which may serve as a warning to those few undesirable and disreputable members of the legal profession who attempt to get business upon the representation that they can secure results for their prospective clients by means other than ordinary legal procedure.

Mr. Justice Myrick, in a concurring opinion (In re Buckley, 69 Cal. 1), said:

"I have no doubt of the proposition that if a person pretend to give out that he can, by improper means, influence the decisions of this court, he is guilty of a contempt and may be punished. The power to adjudge and punish for a contempt in such case is inherent in the court, and has not been circumscribed by the constitution. It is not necessary to look to the statute to see if such an act has been declared to be a contempt, or the punishment thereof has been defined. The judicial department, in this regard, adjudges for itself, being responsible, as in other cases for the abuse of the power. * * * It has been well said by a great writer: 'A judge who listens to private solicitation is a disgrace to his post. If it should prevail it perverts justice; but if the judge be so just and of such courage as he ought to be, as not to be inclined thereby, yet it always leaves a taint of suspicion behind it.' A person who gives out that he can by private solicitation or personal influence procure decisions by a judge, does all he can to bring the office into contempt. The vulgar fellow who misbehaves in open court and interrupts its proceedings commits an offense trifling in chracter as compared with him who holds himself out as capable of bringing the very office itself into disgrace and of making the administration of justice a mockery. The very existence of a court, as a court, needs not only the quiet order of decorum, but it needs the confidence of the community in the impartiality of its decisions."

In the matter of Shay (160 Cal. 399), an original proceeding in the Supreme Court to punish an attorney for contempt for the writing of a letter purporting to relate a conversation with justices of the Supreme Court relative to a pending case on appeal, former Chief Justice Shaw said:

"The persons here named are all persons engaged in the service of the court, assisting it in the exercise of its jurisdiction, and in the performance of its functions. They are actually or potentially officers of the court. They stand in confidential relations toward the court, and in consequence thereof they owe to the court the duty of greater fidelity and respect than are due from other persons. It is apparent that such special duties may be violated by acts not done in the immediate presence of the court, and which would not influence the judges nor affect the proceedings, but which would tend to degrade the court in the minds of the people. If the persons thus immediately connected with the court do not observe proper respect toward it, or make statements derogatory to its character, the public regard and confidence would be as much more affected than by similar behavior on the part of ordinary citizens not connected with the court or familiar with its proceedings. The court should have greater control of these persons than would be necessary with respect to ordinary citizens. It was for the purpose of giving to the court a means of protection against such attacks upon its character—attacks, as it were, from within, that this subdivision (Subdivision 3, Section 1209, C. C. P.) was enacted."

Section 1209 of the Code of Civil Procedure contains thirteen subdivisions specifying certain acts or omissions "in respect to a court of justice, or proceedings therein," as contempts of the authority of the court. It is clear that these are not exclusive.

Contempts are classified as civil and criminal; direct and indirect. Indirect contempts are also referred to as "constructive" and sometimes as "out-of-doors" contempts.

A criminal contempt is one directed against the dignity or authority of the court. It may consist in disorderly, violent or disrespectful conduct or resistance

to process or the doing of a forbidden act. Section 166 of the Penal Code specifies eight different kinds of contempt of court and provides that the commission of any of them amounts to a misdemeanor. Although a contempt is not specified as a criminal contempt in the Penal Code, it is none the less a criminal contempt if it consists in some act done in disrespect to the court.

A civil contempt generally arises out of the failure to obey an order made by the court in a civil action for the benefit of the opposing party. While a criminal contempt is strictly punitive, a civil contempt is remedial in its nature and punishment of civil contempts is coercive. The prime object of punishment in civil contempts is to enforce and insure obedience to the lawful orders of the court. The object of punishment for criminal contempts is to vindicate the authority and dignity of the courts.

A direct contempt is one committed in the immediate view and presence of the court or judge at chambers. It may consist in some disturbance or an act in disrespect to the court, open disobedience of an order or process of the court, refusal to be sworn or to testify, or other conduct intended to interfere with the court proceedings or to hinder or delay the administration of justice. The filing of affidavits containing contemptuous matter, and the use of violent language in a brief in an attempt to intimidate and influence the judge have been treated as direct contempts. All other contempts, not committed in the immediate view and presence of the court or judge, are indirect, or constructive, contempts.

There is an important distinction between direct and indirect contempts in the matter of procedure. In the case of direct contempts, there is no necessity for preliminary process of any kind, formal charges, warrants of arrest, answers or evidence. The court simply takes judicial notice of what has occurred in its presence and punishes summarily. The person who has committed the contempt need be given no opportunity to explain. He has no hearing. A person aggrieved can show only through habeas corpus or certiorari that the court acted in excess of jurisdiction, by reason of the fact that the acts treated as contempt did not, in fact, constitute legal contempt. And an examination of the court order is necessary to determine the facts in the case.

In a direct contempt the court must make and enter an order reciting the acts occurring in the court's immediate view and presence, adjudging that the person committing such acts is thereby guilty of contempt and that he be punished as therein prescribed. The order constitutes the findings of the court and no commitment need be signed by the judge. A copy of the minute order is sufficient authority for the sheriff to hold a person sentenced to jail for such contempt. Unless the order shows on its face the commission of acts which are sufficient to constitute contempt, it is void. It is not sufficient to set forth mere conclusions, as for instance, that the person acted in an insulting and contemptuous manner. No intendment or presumption will be indulged in favor of the order, and unless jurisdiction is shown by the order it will be presumed that the court acted without or in excess of its jurisdiction.

An exact and somewhat technical procedure is provided in constructive contempts. The procedure prescribed by Sections 1210 to 1222, inclusive, of the Code of Civil Procedure has been amplified and extended by numerous decisions of the appellate courts. Section 1211 provides that if the contempt is not committed in the immediate view and presence of the court, or judge at chambers, "an affidavit shall be presented to the court or judge, of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officer." Section 1212 provides three methods for bringing the person charged with a contempt before the court to answer to the charge: (1) Warrant of attachment; (2) Notice; (3) Order to show cause. "And no warrant of commitment can be issued without such previous attachment to answer, or such notice or order to show cause."

The legal principles enunciated by numerous previous decisions of the Supreme Court of this State are epitomized by former Chief Justice Myers in his opinion in the case of Hotaling v. Superior Court, 199 Cal. 501, as follows:

> "Contempt of court is a specific criminal offense. A contempt proceeding is not a civil action either at law or in equity, though it may be ancillary thereto, but is a separate proceeding of

a criminal nature and summary character, in which the court exercises but a limited jurisdiction, and in which the people of the State prosecute the action.

"In a prosecution for constructive contempt the affidavits on which the citation is issued constitute the complaint. The affidavits of the defendant constitute the answer or plea and the issues of fact are framed by the respective affidavits, serving as pleadings. A hearing must be had upon these issues, at which competent evidence must be produced. The proceeding is of such a distinctly criminal nature that a mere preponderance of evidence is insufficient, the defendant cannot be compelled to be sworn as a witness and he cannot be convicted upon the uncorroborated testimony of an accomplice.

"While the writ of certiorari is not a writ of error, it nevertheless extends to the whole of the record of the court below and even to the evidence itself where necessary to determine jurisdiction. In reviewing this proceeding, the charge, the evidence, the findings and the judgment are all to be strictly construed in favor of the accused and no intendments or presumptions can be indulged in aid of their sufficiency. If the record of the proceedings, reviewed in the light of the foregoing rules, fails to show affirmatively upon its face the existence of all necessary facts upon which jurisdiction depended, the order must be annulled."

Contempt proceedings, in the case of indirect, or constructive contempts, are initiated by the filing of an affidavit. In regard to acts that constitute a criminal contempt, the affidavit may be made and filed by anyone. In civil contempts, the affidavit is usually made by a person, or an officer of a corporation, for whose benefit an order or judgment has been given.[1] Supporting affidavits of other persons, strangers to the action, who have personal knowledge of the facts on which the alleged contempt is based may be filed, and there appears to be no legal objection to the proceeding being initiated by an attorney or any other person authorized to act for the party beneficially interested. Although the fact is not set forth in the affidavit, it will be presumed that the affiant is acting with authorization. But the courts frown upon mere strangers stirring up contempt proceedings when the contempt grows out of a civil action.

The purpose of the affidavit is two-fold: first, to inform the court of acts and conduct alleged to be contemptuous; secondly, to inform the person alleged to be in contempt of court of the accusation brought against him.

The affidavit is equivalent to a complaint or indictment in a criminal action, and as necessary. While it need not be drawn in strict conformity to the rules of criminal proceedings, it must set forth all the material facts and essential ingredients of an offense by distinct and positive averments. In other States objections to the sufficiency of the affidavit are deemed waived, unless objected to prior to the hearing, but this is not the rule in California. Unless the affidavit is sufficient the court does not acquire jurisdiction and all proceedings taken are void ab initio. It is no defense that the affidavit is unartfully drawn, but it is essential that all of the facts relied upon must be alleged, for no evidence can be taken at the hearing outside of the allegations of the affidavit. No essential allegations may be supplied by implication. The affidavit need not contain all of the evidentiary facts, but may allege the facts generally, the same as in an indictment, complaint or information. It should not state conclusions of law. If the facts stated are not sufficient to show that a contempt has been committed, the court is without jurisdiction to proceed and any judgment based thereon is void and will be so declared on certiorari. In such case it is immaterial to show what facts were established in evidence at the hearing.[2]

An insufficient affidavit may be corrected by the filing of a new or supplementary affidavit. This is somewhat equivalent to the amendment of a criminal complaint or information, and the rights of the accused in such cases are substantially the same as those of the defendant in a criminal prosecution.

Generally it is necessary to allege or show intent in some way, although where facts are alleged implying an intent, the courts have held that the accused must be

1 McFarland v. Superior Court, 194 Cal. 407.
2 Frowley v. Superior Court, 158 Cal. 220; Hutton v. Superior Court, 147 Cal. 156; Otis v. Superior Court, 148 Cal. 129; Ex parte McCarthy, 154 Cal. 534.

presumed to have intended the ordinary consequences of his own deliberate act.[3]

An affidavit made on information and belief appears to be sufficient in California. At least it has been held that such affidavit will be construed liberally and a conviction will not be set aside because some of the material allegations were made on information and belief. In connection with one case (Ex parte Acock, 84 Cal. 50), the court said:

> "It would be impossible in many cases of contempt committed out of the presence of the court to secure the apprehension or conviction of the guilty parties if every fact essential to sustain the judgment were required to be stated in positive terms."

In all constructive contempts based upon alleged violations of court orders, there are three primary essentials: (1) There must be notice or actual knowledge on the part of the person accused of contempt of the existence of the order or judgment he is alleged to have disobeyed; (2) The thing ordered to be done must be within the power of the person to perform; (3) The court must have had jurisdiction to make the order.

Therefore, where violation of an order is the basis of contempt, the affidavit should contain averment of facts showing these essentials. The affidavit is fatally defective and the court has no jurisdiction to proceed, unless it shows affirmatively that a copy of the court order was served on the party accused of contempt or that he had knowledge of the terms and conditions of same.[4] An averment that the defendant was present in court at the time the order was made has been held sufficient allegation of knowledge.[5] It is unnecessary that the affidavit show that the original order or a certified copy thereof was served on the defendant. A mere copy is sufficient to give him notice.

The affidavit should allege ability on the part of the defendant to comply with the order, although the omission of such averment does not make the affidavit fatally defective in all cases, as where there has been a specific finding by the court as to the ability of the person to perform the acts he is ordered to do.

It is good practice always to set out in the affidavit sufficient facts to show the jurisdiction of the court to make the order. In this connection it must be understood that a hearing on contempt is a special proceeding and even a civil contempt is not a part of the civil action out of which it grows. Although for convenience the affidavits and other papers are filed with the files and records of the civil action, such other files and records form no part of the record which may be considered by the appellate court on certiorari or habeas corpus. At the contempt hearing the court may take judicial notice of the files of the civil action, but these are not certified upon the issuance of a writ of review. Therefore the jurisdictional facts as to the making of the order should be alleged in the affidavit.

The attachment, notice or order to show cause, referred to in Section 1212, Code of Civil Procedure, is not only to bring the accused before the court but to give him an opportunity to learn the nature of the charge against him and to present his defense. The five-day rule as to notice does not apply in contempt hearings, but one charged with contempt must have reasonable notice of the proceeding, must be afforded a reasonable time in which to prepare his defense and must be given an opportunity to be heard. What is a reasonable time depends, of course, upon the circumstances of the particular case. He is entitled to the same general rights as a defendant in a criminal action with respect to having a full and fair hearing, or his day in court.

The notice or order to show cause must be served personally where the proceeding is one to punish for criminal contempt, although a voluntary appearance waives the necessity for an attachment. If, in a civil contempt, a party conceals himself to avoid service, the court may order service on an attorney of record.[6]

The affidavit should be served upon the defendant with the order to show cause, although service of the latter alone is undoubtedly sufficient to confer jurisdiction. But if the affidavit is not served before the return date and if it appears that the defendant is unfamiliar with the matters

3 Hutton v. Superior Court, 147 Cal. 156; Ex parte Creely, 8 Cal. App. 713; In re Jarvis, 57 Cal. App. 533.

4 Ex parte Ward, 194 Cal. 49.

5 Ex parte Cottrell, 59 Cal. 417.

6 Foley v. Foley, 120 Cal. 33.

therein contained, he is entitled to a continuance in the discretion of the court.

In other judisdictions it is held that if no answering affidavit or other pleadings are filed by the respondent the allegations of the original affidavit stand confessed. This does not appear to be the rule in California because of the distinct criminal nature of the proceedings, although allegations in the affidavit not denied are considered to be admitted.[7]

Contempt hearings are much more informal and not subject to the strict rules of criminal trials, and it has been held that the production of witnesses may be waived and a person charged with contempt may consent to a trial on affidavits.[8] Frequently no answering affidavit is filed, but this does not render unnecessary the taking of evidence. In theory, the State prosecutes every contempt; the burden of proof is on the prosecution, and the evidence must be clear and satisfactory. Mere preponderance of evidence does not warrant conviction. But where the defendant admits the non-compliance with the order and places his defense upon the ground of inability to perform, the burden is cast upon him to show such inability. In fact, it has been held that where the non-compliance with an order of court is shown, the burden is immediately placed upon the defendant to purge himself of contempt.[9]

Failure to obey an order does not constitute contempt, when such failure is caused by inability to comply with the order, unless such inability is due to the conduct of the person charged.[10] Whether it is within the power of the accused to comply with the order or decree is a question of fact for the court making the order to determine. The court's findings are conclusive.[11] It has been held that inability to comply with the order is a defense only if it is not due to the voluntary and fraudulent conduct of the accused.

It is no defense that the defendant acted on advise of counsel.[12] But this may be considered by the court in mitigation of punishment. It is always a complete defense to show that the court was without jurisdiction to make the order with the violation of which the defendant is charged.[13] But it is not sufficient to show that the order was erroneously made, since the party aggrieved had the right of appeal from such order. If the court had the jurisdiction to make the order, it must be treated as conclusive in a contempt hearing.

At the conclusion of the hearing, when one is adjudged guilty of contempt, there must be a formal commitment and the court must make written findings in some form. The cases speak variously of findings, judgment and commitment, but it has not been adjudicated just what form these should take. The commitment is not based upon the affidavit, but upon evidence, and there must be some record of the facts found by the court. It is sufficient if the commitment recites the facts which constitute the contempt as shown by proof, although the facts alleged in the affidavit need not be set out. It has been held that the specific facts constituting the contempt should be definitely stated in the commitment, in order that the appellate court may determine whether a contempt has actually been committed. It is not sufficient to state in a general way the conclusions of fact on which the conviction is based.

There is no appeal from the decision of the court adjudging one in contempt of court, except where a criminal contempt is charged and punished as a misdemeanor.[15] Section 1222 of the Code of Civil Procedure provides that "the judgment and orders of the court or judge in cases of contempt are final and conclusive." The aggrieved party has but two remedies, habeas corpus and certiorari, the scope of the inquiry in each case being limited solely to the question of jurisdiction.[16] Certiorari will not be granted to review errors of law or mere questions of fact. However, the evidence may be examined under a writ of review for the purpose and to the extent of determining whether or not the facts

7 Mitchell v. Superior Court, 163 Cal. 423.
8 Roe v. Superior Court, 60 Cal. 93.
9 In re Pillsbury, 69 Cal. App. 784.
10 Van Hoosear v. Railway Commission, 189 Cal. 228; Ex parte Joutsen, 154 Cal. 540; In re Crowden, 139 Cal. 244; Ex parte Van Gerzabek, 63 Cal. App. 657.
11 Ex parte Cottrell, 95 Cal. 418.
12 Cole v. Superior Court, 28 Cal. App. 1.
13 Tomsky v. Superior Court, 131 Cal. 620; Ex parte Clarke, 126 Cal. 235.
14 Ex parte Lake, 65 Cal. App. 420; In re Shortridge, 5 Cal. App. 371.
15 Tripp v. Tripp, 190 Cal. 201; Gale v. Tuolumne, etc., Co., 169 Cal. 46; Bond v. Superior Court, 174 Cal. 376; People v. Durrant, 116 Cal. 179.
16 Ex parte Lake, 65 Cal. App. 420.

necessary to give jurisdiction existed.[17] When habeas corpus is resorted to, the higher court will not consider the findings upon which the judgment is based, but the affidavit will be looked into, to determine if the court had jurisdiction to proceed with the hearing.

Except where a criminal contempt is prosecuted as a misdemeanor, the punishment is limited to a fine not exceeding five hundred dollars or imprisonment not exceeding five days, or both. But where the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he performs it, and in that case the act must be specified in the warrant of commitment.

When acts are separately stated as constituting distinctive contempts, each act may be considered a separate contempt and separately punished. The limitation fixed by the legislature of five days and five hundred dollars has been held to be constitutional only because such punishment has, in the past, been found sufficient to protect the courts. The courts do not, however, recognize the power in the legislature to limit punishment, although it is conceded that the legislature may prescribe procedure to be followed.[18]

When fine is imposed as punishment, the court may enforce payment by imprisonment with the provision that the defendant shall serve one day for each two or more dollars of the fine. After final judgment is entered, the court may not alter the punishment.[19]

The question frequently arises, particularly in divorce cases, whether one who has not complied with the order of court may have any standing in court on a motion to modify a previous order, so long as he has failed to comply with such order. It is a harsh and arbitrary rule that denies a party relief on a proper showing if he is not actually found to be in contempt of court. The fact that a person is in contempt has been held not to deprive him of his rights as a litigant. The court may not punish a contempt by depriving the contemner of his right to answer, although before 1907 a contempt could be punished by dismissing a complaint or striking an answer. But until one in contempt purges himself, he is entitled to no favor or privilege.

In two recent cases, in both of which the opinion was written by Chief Justice Waste, the Supreme Court has gone far in laying down a strict rule as to the legal rights of contemners. In Weeks v. Superior Court, 187 Cal. 620, it is said:

> "No rule of law seems more widely prevalent or better established than that a court whose authority has been put to naught will extend no favors or privileges to the party in contempt until he has acknowleged its authority by purging the offense."

In the case of Knoob v. Knoob, 192 Cal. 95, in dismissing an appeal from an order modifying a previous order relating to the custody of a child because a wife, who was the appellant, had, in violation of the order, taken the child out of the State, the court said that one in contempt "cannot with right or reason ask the aid or assistance of this court in hearing her demands while she stands in an attitude of contempt to the legal orders and process of the courts of this State which she seeks to avoid through the intervention of an appeal to this tribunal."

In the case of Paddon v. Superior Court, 65 Cal. App. 34, in which the petitioner sought to set aside a judgment and commitment of the Superior Court holding him in contempt of court for failure to obey a subpoena duces tecum on the ground that the court had no jurisdiction to issue same and compel its obedience, the Appellate Court held that because the petitioner had failed to appear or testify in obedience to the subpoena he must first purge himself of the contempt before he could raise the question of the jurisdiction of court to compel the production of books and papers specified in the subpoena duces tecum. It is further interesting to note that in this case it is held that refusal to obey a subpoena is contempt in the presence of the court, which may be punished summarily by the court without the necessity of the filing of an affidavit.

17 People v. Latimer, 160 Cal. 716; White v. Superior Court, 110 Cal. 60; McFarland v. Superior Court, 194 Cal. 407; Strain v. Superior Court, 168 Cal. 216.

18 In re Garner, 178 Cal. 409; **Lamberson v.** Superior Court, 151 Cal. 458.

19 In re Barry, 94 Cal. 562.

The President's Page

Fellow Members,
Los Angeles Bar Association:

Our genial president, when he assumed his office, announced that he proposed during his term to distribute the job among all the officers of the Association. He is a man of his word. Instructions have just come from him that I fill the president's place on the BULLETIN for this issue. It is suggested that I say something about the future of the voluntary bar association.

The topic seems a timely one, as the query, "What will become of our local bar associations?" is quite often heard since the Incorporated Bar Bill became a law.

It seems to me that the voluntary local bar association has as much reason for its existence today as it had before the bar of the State became incorporated. However, the voluntary State bar association is probably a thing of the past.

The Incorporated Bar has taken over the work of investigating, hearing and prosecuting charges against members of the bar. A few years ago attention to grievances against attorneys, with an occasional dinner to the Justices of the Supreme Court or other notables, practically covered the work of the Association, but during more recent years we have been active in other directions. The release of our local association from handling charges against members benefits our treasury and the Board of Trustees. The grievance work will, however, still be carried on by substantially the same men who formerly performed it. This work has been steadily increasing as the membership of the bar of this county has grown. A reading of the rules of conduct recently promulgated by the State Bar might lead one to believe that the Grievance Committee work will rapidly increase rather than decrease. The local association should of course always stand ready to assist in this work.

There are, it seems to me, some things that the voluntary local bar association, particularly in the large centers of population, may do that can not be done by the Incorporated Bar. I shall refer to a few practical ones. Others will readily occur to the reader.

It is desirable that the fraternal spirit in the profession be promoted and maintained. This is something that the voluntary association can and does do, through its frequent meetings. The Incorporated Bar can hardly do much along this line. Its meetings will be held at different points throughout the State; they can not be held often enough in one place to make them gathering points where the members of the local bar may mingle and become better acquainted. The voluntary local association is in its nature a social organization. In Los Angeles the Association's dinners bring several hundred lawyers together once a month, with the result that agreeable acquaintances and friendships are often formed by members, who might otherwise go years without coming in contact with one another. If the voluntary association did nothing else than hold frequent dinner meetings, it would justify its existence. Then, too, when a distinguished teacher of the law, eminent judge, or leader of the bar visits the community, the organization is at hand, ready to arrange a meeting to do him honor and give the local members an opportunity to hear him. This, of course, could be done if there were no local association, but much less smoothly.

The voluntary association can co-operate with the local courts, and advise concerning ways and means of expediting the business of the courts. The Judicial Council is doing a great work in this respect, but there are local problems for the courts to handle and in these the local association can be of help. Committees of our Association have often met with the judges or committees representing the judges of our courts, at which meetings suggestions for changes in the manner of handling the business of the courts have been discussed and views exchanged with, I believe, much benefit to all concerned. Of course, if there were no local association, the judges doubtless would call on some of the lawyers practicing before them and discuss proposed changes, but if there is already in existence a local association representing a substantial number of the local bar, its governing board is the one to which the judges will naturally turn for co-operation.

It is the established policy of our local Association to determine the attitude of its

members on the qualifications of candidates for appointment or election to judicial office and, after such determination is made and candidates have been endorsed, to carry on campaigns for their election. To be sure, we have not yet found a wholly satisfactory method for the selection of candidates who are to receive our support. We cannot devise one that is perfect, but it seems to me that we ought, by some method most likely to procure an expression of the real opinion of the bar on the qualifications of candidates, determine the views of the members of the Association as to condidates and then provide the funds and campaign organization to elect those who are endorsed, and by the same token make an active campaign to defeat any candidate declared by a sufficiently emphatic vote of the Association to be not qualified for judicial office. This is a work of the highest importance. The local association must do it if it is to be done by the bar. The State Bar can not, in the nature of things, very well undertake anything of the kind. The members of its Board of Governors are selected to represent the bar of the whole State; they can not officially participate in local political contests. I assume that nearly everyone will concede that judges who have shown themselves qualified for the offices they hold, should not be subjected to the burdens of a campaign for re-election, nor should they, between elections, be subject to the fear that if they do not keep their names constantly before the public they will be forgotten and displaced at the next election. Unless the burden of campaigns for elections is taken over by the voluntary bar association, the candidates must organize their own campaigns, get funds from friends or grateful recipients of judicial patronage, or by appeals to the bar or the public. Local associations should exist for the purpose of assuming the burdens of campaigns for the election of qualified judges, if for nothing else.

In matters of legislation affecting the local courts, the organized voluntary local association can be most effective. If we need more judges or better pay for judges, the local association can do more towards getting the proposed legislation through the Legislature and executive approval affixed thereto than can any committee of lawyers representing an unorganized local bar. While the State Bar and the Judicial Council may recommend needed legislation of that character and such recommendation will

carry great weight, the active efforts of the organized local bar will still be needed to carry it through.

Los Angeles county needs a court house in which at least all the Superior Courts may be housed under one roof. We might well make it the business of our local Association to keep that need before the public and the authorities until the building is forthcoming.

The State Bar may not always be governed by such earnest and conscientious men as those who now constitute its Board of Governors. In time, capricious and arbitrary men more concerned with their own ambitions than with the welfare of the bar may control its affairs and may disregard and over-ride the rights of the individual members of the bar. If so, vigorous voluntary local associations can and will take up the grievances of individual members and far more effectively obtain redress than can the individuals themselves.

And, after all, the bar will inevitably be organized locally, whether there is need of it or not. Practically every profession, business and trade is organized locally, nationally and some of them internationally. The local bar will have to be organized to be in fashion.

LEONARD B. SLOSSON,
Vice-President, Los Angeles Bar Association.

Doings of the Committees

COMMITTEE ON MUNICIPAL CORPORATIONS

Upon call of the chairman, Mr. Jess E. Stephens, the Committee on Municipal Corporations held its first meeting on Monday, April 23, at the Alexandria Hotel. There were present: Jess E. Stephens, chairman, presiding; James H. Howard, vice-chairman; Earnest R. Purdum, secretary, Vincent Morgan, Pierson M. Hall, Herman Mohr, Chester L. Coffin and J. L. Elkins.

It was ordered by the Committee that the Committee on Co-ordination of All Committees be requested to frame an outline of this committee's powers and jurisdiction, and that this committee have the privilege of going over the outline of its duties before its being presented for adoption.

A discussion took place as to the power of the Committee to draft bills relative to municipal corporations and the procedure it would follow to insure the passage of such bills. It was the opinion of the Committee that the bills should be referred to the trustees of the Association for their presentation to the Committee on Legislation, whose duty it would be to see that the bills receive the proper attention before the Legislature. After a round table expression of the matters that should be brought before this committee, Chairman Stephens stated that he would have something to offer at a later date.

The Committee adjourned, subject to the call of the chair, such call to give members of the Committee five days' notice.

COMMITTEE ON LEGISLATION

Upon call of the chairman, Mr. Everett W. Mattoon, the Committee on Legislation held its first meeting on Friday, April 20, 1928, at the Alexandria Hotel. Present: Chairman Mattoon, presiding; Ida May Adams, secretary; Otto J. Emme, Joseph N. Owen, Allen P. Nichols and J. Harold Cragin of the Committee, Secretary Robert F. Variel and J. L. Elkins.

A round table discussion took place as to the various ways and means by which the Committee may promote legislation originating with it or with other committees.

The third Friday of each month was named as a regular meeting day. The meetings, which will be called at least five days in advance by the chairman, will be held at the Athletic Club.

COMMITTEE ON THE BULLETIN

The meeting was called to order at 12:30 p. m. by Chairman Copp at Parlor "E," Alexandria Hotel. Those present were: Chairman Andrew J. Copp, Lucius K. Chase, Franklin K. Lane, Maurice Saeta, Henry I. Dockweiler, Harry Graham Balter, R. H. Purdue, G. C. Turner and J. L. Elkins.

The subject of discussion was the devising of ways and means for putting the BULLETIN on a firm financial basis. It is the endeavor of the Committee to effect a substantial increase in the amount of advertising in the BULLETIN. Respectfully submitted,

HARRY GRAHAM BALTER.
Secretary.

PERSONAL COMMENTS

The Bulletin Committee has suggested that space in the BULLETIN be given to personal items of interest relating to members of the Association. The editor welcomes this suggestion and will appreciate the assistance of attorneys who will mail to the BULLETIN office for publication personal comments concerning fellow-members of the Association.

The items need not all be of a professional nature. If a lawyer goes fishing, somebody might like to hear how many fish he caught. If he is appointed to serve on some civic committee or accepts an invitation to adress a woman's club, the Bar Association ought to know about it.

GOLF

The only golf event on the Bar Association calendar for May, is the Tournament between the North and South at Del Monte, Friday, Saturday and Sunday, May 25th, 26th and 27th. If you have not given in your name to the Committee, DO IT NOW. Phone or write to E. E. Noon, Chairman Golf Committee, 924 Merchants National Bank Building, VAndike 8881.

The regular monthly event for June will be held at Girard Country Club, Saturday afternoon, June 2nd, in the form of a 3-Way contest among the Golfing Doctors, the Golfing Dentists and the Golfing Lawyers. The match will be played in threesomes, thereby constituting a 3-in-1 contest. Play will be had during the afternoon, followed by a dinner with ENTERTAINMENT in the Girard Country Club's new Club House.

PLACE THIS DATE ON YOUR CALENDAR NOW

AN OPPORTUNITY TO SERVE THE ASSOCIATION

The BULLETIN can be made financially successful only through increased revenue from additional advertisements. Members of the Bar Association are urged, from the standpoint of loyalty to the organization, to aid the publication in procuring advertisements, by suggesting to those who deal in any manner with the legal profession, that they avail themselves of the pages of the BULLETIN as a most effective medium to convey messages to the attorneys of Los Angeles county.

The Lawyer's Responsibility Under the State Bar Act

By JOSEPH J. WEBB, *President of Board of Governors, State Bar of California.*

(Address delivered at the twenty-fifth annual banquet of the University of Southern California School of Law, March 9, 1928.)

Young ladies, young gentlemen, your chosen profession, which should be one of service to your state and your country, is a noble one in its basic and fundamental conception.

Sir Edmund Burke paid the profession this encomium that "next to the ministry of heaven is the ministry of law."

We should never forget that we are bound by a solemn oath to serve as acolytes in the temple of justice.

Upon the younger generation of lawyers and upon the law students rests the future of the American bar and we may not be going too far, when we add that the future of American civilization, to a large extent, rests upon the members of the profession. This is a broad statement, yet many think it will stand the test of analysis. Perhaps the most important branch of our government is the judicial branch, for it treats of the administration of justice—justice, so essential to the peace, happiness and prosperity of our country.

George Washington, in nominating the first judges to the United States Supreme Court, spoke as follows:

> "Considering the judicial system as the chief pillar upon which our national government must rest, I have thought it my duty to nominate for the high office in that department such men as I have conceived would give dignity and luster to our national character."

Daniel Webster gave expression to this idea:

> "Justice holds civilization together, and is indispensable to social security and to the happiness and progress of the race."

Charles E. Hughes, at the conference of Bar Association delegates held in Washington, D. C., in May, 1926, stated in part as follows:

> "The administration of justice is the concern of the whole community, but it is the special concern of the bar."

Lord Chief Justice Hewart of England, at the American Bar Association convention held at Buffalo last September, expressed a similar idea in the following words:

> "The administration of justice is of greater importance to the people than anything else, and it is confidence in the administration of justice which, beyond anything else, makes the people contented and happy. Where there are just laws administered without fear or favor, by incorruptible and impartial judges, there is not much cause to fear popular outbreaks or revolutions."

If there be merit and truth in the statements just quoted, then it is not too much to say that a very great responsibility rests upon the members of the bar in regard to the administration of justice and also in regard to maintaining the ideals of American civilization.

The questions that naturally arise are these: Whither are we going? What are we trying to accomplish, and how are we to do it? Is the bar, as a body, following the present-day trend toward commercialism? Are the members of the bar floating with the tide, or are they trying to swim against the current? Are our law schools to become places principally interested in preparing and educating men and women to conduct successfully a commercialized law practice or a business enterprise, or are they primarily interested in developing character in those who will make a fight to maintain their mental independence and to be subservient to one master only, their conscience? Are our young men and young women being taught to make no alliances depriving them of the precious privilege of thinking, and, after having thought, fearlessly expressing their thoughts? Some may say that the effort to maintain high ideals, while worthy, is not practicable.

The famous French statesman and historian, Guizot, once inquired of Lowell: "How long do you expect your Republic to endure?" "So long," was the reply, "as the ideals of its founders are maintained." At a newspaper men's luncheon held last year, President Coolidge used these words: "The danger to America is not in failing to maintain its economic position, but in failure to maintain its ideals. If America wishes to maintain its prosperity it must maintain its ideals."

We must be willing to fight and sacrifice, if need be, for our ideals.

To those who have been active in Bar Associations for the past few years there are many hopeful signs; the activities of our real leaders, such as Honorable William H. Taft, Honorable Elihu Root, Honorable Charles E. Hughes, and men of like character; the activties of the American Bar Association, the State bar associations, local bar association, together with the attitude of the worth-while law schools.

The Judicial Council and the State Bar Act are the results of an awakened conscience; they evidence a forward looking spirit; they are concrete efforts on the part of the California Bar to measure up to its responsibilities, to adjust itself to changing conditions and to provide adequate machinery in order that it may cope with the complexities incident to the development of the law.

The administration of justice is not what it should be. The enduring remedy must come through lawyers, and the people look to the bar for constructive leadership. We have asked for, and we have been given power commensurate with our responsibilities, and it now rests upon the California Bar to assume effective leadership, made possible through the instrumentality of the State Bar Act.

We, however, must bear in mind that statutory organization is not the ideal for which we are striving; it is the means to an end. To attain our end, we must be a self-conscious body, united in spirit as well as in form. The State Bar Act furnishes the means and the machinery; the members of the bar must, can, and, we believe, will, furnish the spirit, courage and determination essential to final success. Our progress rests on our faith, courage and honor and our ability to cooperate one with the other.

One of the important problems confronting the legal profession and now being studied by the Board of Governors is that of maintaining high ethical and moral standards. The people are vitally interested in this matter, for it is a concrete and not an abstract proposition with them. They come in actual contact with the violations of these standards, suffer therefrom, and instinctively turn to the bar for redress. The first step taken was to prepare rules of procedure in disciplinary matters. I believe that the bar has not, as yet, grasped the real significance in regard to these rules. Our State Supreme Court has said that a license to practice law is not the grant of a right, but the grant of a valuable privilege; that a disbarment proceeding is quasi-criminal in its nature.

Heretofore disbarment proceedings have been extremely technical, yet the Board of Governors has simplified the procedure of trials against members of the bar charged with misconduct. If the bar, in matters which affect the right of a lawyer to practice his profession, can simplify procedure, why cannot it simplify procedure in civil and criminal matters? It can, and ultimately will, for we are laying a precedent for such a change. It is a process of education.

The following matters will be given early attention by the Board, and submitted to the members of the California Bar for consideration:

1. Simplification of procedure in probate matters;
2. Simplification of procedure and shorter records on appeal;
3. Simplification and better methods of selecting juries;
4. Summary judgments;
5. Abolishing demurrers and motions to strike out.

Another step in the solution of the problem is the preparation of rules of ethics, not merely declaration of principles, but enforceable rules, the violation of which can be punished under the provisions of the State Bar Act.

The Board of Governors is now engaged in the preparation of such rules of conduct, which will be printed in pamphlet form after approval by our State Supreme Court and then sent to every member of the State Bar of California for consideration and study. After the rules of procedure have been clarified by actual experience and the rules of conduct promulgated,

(Continued on Page 28)

Proposed Official

BAR ASSOCIATION BUILDING

On Flower Street (between Sixth and Seventh Streets)

For Information

PHONE MR. J. L. ELKINS

TUcker 1384

Assembly Constitutional Amendment Number 27—Water Rights

SPECIAL REPORT MADE TO THE COMMITTEE ON CONSTITUTIONAL AMENDMENTS

By S. B. ROBINSON *of the Committee*

(Filed December 6, 1927)

(Continued from last issue)

The ensuing years brought much discussion and some litigation involving the vexed question, but the next phase of the movement against riparian rights which requires comment here came with the 1911 session of the Legislature.

From the adoption of the codes in 1872 until 1911, section 1410 of the Civil Code had simply declared that:

> "The right to the use of running water flowing in a river or stream or down a canyon or ravine may be acquired by appropriation."

The Legislature at its session of 1911 amended section 1410 of the Civil Code to read as follows:

> "All water or the use of water within the State of California is the property of the people of the State of California, but the right to the use of running water flowing in a river or stream or down a canyon or ravine may be acquired by appropriation in the manner provided by law; provided, that no water for the generation of electricity or electrical or other power may be appropriated for a longer period than twenty-five years, except by a municipal corporation, other than an irrigation district or a lighting district, or by an irrigation district when such electricity, electrical or other power is for use and distribution only within its own limits, and as subsidiary to and mainly for the purpose of serving and carrying out irrigation, or by a lighting district when such electricity, electrical or other power, is for use and distributon only within its own limits." (Amendment approved 1911; Stats. 1911, p. 821.)

This section has not since been amended, or expressly repealed, although it is no doubt controlled, and possibly repealed by implication, by the Water Commission Act of 1913.

At the same session of 1911 the Legislature enacted the statute sometimes called the Water Power Act of 1911 (Stats. 1911, p. 813), Section 4 of which declared that:

> "Sec. 4. All water power or the use of water which has been heretofore appropriated and which has not been put, or which has ceased to be put, to some useful or beneficial purpose, or which is not now in process of being put to some useful or beneficial purpose with due diligence in proportion to the magnitude of the work necessary properly to utilize for the purpose of such appropriation such water or such use of water, is hereby declared to be unappropriated."

At the 1913 session the Legislature adopted the Water Commission Act (Stats. 1913, p. 1013). The referendum was invoked and the act was submitted to popular vote at the general election of 1914 and approved.

Section 11 of this Act provides in part as follows:

> "Sec. 11. All water or the use of water which has never been appropriated, or which has been heretofore appropriated and which has not been in process, from the date of the intial act of appropriation, of being put, with due diligence in proportion to the magnitude of the work necessary properly to utilize for the purpose of such appropriation such water or the use of water, or which has not been put, or which has ceased to be put to some useful or beneficial purpose, or which may hereafter be appropriated and cease to be put, to the useful or beneficial purpose for which it was appropriated, or which in the future may be appropriated and not be, in the process of being put, from the date of the initial act of appropriation, to the useful or beneficial purpose for which it was appropriated, with due diligence in proportion to the magnitude of the work

necessary properly to utilize for the purpose of such appropriation such water or the use of water, is hereby declared to be unappropriated. And all waters flowing in any river, stream, canyon, ravine or other natural channel, excepting so far as such waters have been or are being applied, to useful and beneficial purpose upon, or in so far as such waters are or may be reasonably needed for useful, and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is and *are hereby declared to be public waters of the State of California and subject to appropriation* in accordance with the provisions of this act. If any portion of the waters of any stream shall not be put to a useful or beneficial purpose to or upon lands riparian to such stream for any continuous period of ten consecutive years after the passage of this act, such non-application shall be deemed to be conclusive presumption that the use of such portions of the waters of such stream is not needed upon said riparian lands for any useful or beneficial purpose; and such portion of the waters of any stream so non-applied, unless otherwise appropriated for a useful and beneficial purpose, is hereby declared to be in the use of the State and subject to appropriation in accordance with the provisions of this act."

This section was amended in 1910 and again in 1923. However this was without change in the portion quoted and so had the effect of a re-enactment of those portions.

The most casual examination of these enactments will show that they are based on the Colorado theory that the right of appropriation springs from the sovereign right of the people and not from the consent of the riparian proprietor.

It thus appears that four or five different sessions of the Legislature and the voters at one election have declared in favor of at least the partial adoption of the Colorado doctrine.

After all these efforts to change the law of riparian rights the Supreme Court held in the Herminghaus case that riparian rights as recognized by the common law were vested property rights which could not be impaired or taken away, unless by the exercise of the power of eminent domain.

A discussion of the question of the extent to which the Water Commission Act was in that decision by necessary implication held to be unconstitutional, might throw some indirect light on the present topic, and is a subject to which the Bar Association might well give careful thought, but to enter upon it here seems unnecessary, and would unduly lengthen this report.

This brings us to the direct consideration of the proposed amendment, which was approved by the Legislature almost immediately after the decision in the Herminghause case, for submission to the people at the next general election.

The proposed amendment consists of four sentences, which may be considered separately. The first reads as follows:

> "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare."

It will be noted that this sentence is a declaration of public policy, and that this declaration extends to "the water resources of the State," thus apparently applying to flowing streams, whether navigable or non-navigable, lakes and underground waters, and without distinction as to the nature of the right under which the use is to be made, whether under riparian ownership, ownership of land containing underground waters, appropriation, eminent domain or prescription.

The second sentence reads as follows:

> "The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water."

This appears to relate only to flowing water in or from any natural stream or water course, although if the section is adopted it may be contended by some that the words "in or from any natural stream

or water course" relate to and modify only the immediately preceding words, viz., "the use or flow of water," and that the word "water" as it appears as the fourth word in the sentence is unmodified. The effect of this interpretation, if sustained, would be to make the sentence applicable to all "water," whether flowing or not, and whether surface or underground.

The apparent purpose of the sentence is to limit riparian owners to reasonable use even as against appropriators.

The third sentence reads as follows:

> "Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; *provided, however,* that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfull entitled."

The apparent purpose of this sentence is to make it clear that the abolition of riparian rights was not intended, but that their limitation to present or future reasonable beneficial use was intended. It does not include the forfeiture for ten years non-use appearing in the Water Commission Act. Out of abundance of caution it declares that it shall not deprive any appropriator of water to which he is entitled.

The fourth sentence reads as follows:

> "This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

This seems to need no comment.

It will be noted that the section does not purport to grant any right of appropriation, or to declare that any surplus water remaining in a stream after satisfying the reasonable uses to which riparian proprietors are to be limited is subject to appropriation. Obviously a rule which limited riparian owners to a beneficial use, but did not contemplate the use by others of the resulting surplus would be out of harmony with the policy declared by the section. Clearly then the section proceeds on the theory that the right of appropriation is sufficiently given by existing statute law.

The Water Commission Act certainly does in terms purport to give that right, but notwithstanding its plain declarations, it has never been recognized by the Supreme Court as conferring any right of appropriation. Since its enactment, just as before, the Supreme Court has recognized the consent of the riparian proprietor as the only thing which confers any right of appropriation in this State. The adoption of the amendment, if held valid, would mean the incorporation into our law, by implication, of a new kind of appropriation, like that recognized in Colorado, having its source in the sovereign will of the people, and not in the consent of the riparian proprietor.

It seems logical to consider next the arguments for and against the limitation or abolition of riparian rights. Some of them are not strictly speaking arguments for or against the proposed amendment, for they regard the limitation of riparian rights as something already accomplished, but they seem to be frequently referred to when the proposed amendment is under discussion, and this report would therefore be incomplete without mention of them.

These arguments may be divided into three classes, first, the arguments on the question of policy, as to whether or not the public interest would be subserved by limiting riparian rights; second, the strictly legal arguments as to whether or not such limitation has been or can be imposed, and third, an argument which seems in part one of policy and in part one of law, viz., that even if an amendment such as the one proposed cannot of itself work a limitation, it is nevertheless desirable that such an amendment should be adopted, as an expression of popular opinion, helping to mold the law.

Any detailed consideration of the arguments of the first class, viz., those on the question of policy, would seem to lead outside the sphere of a Bar Association, and obviously the question is wholly immaterial as a practical matter, if the consideration of the legal question as to whether or not such a limitation can be imposed leads to an answer in the negative.

It seems sufficient, so far as the question of policy is concerned, to quote thus from the decision in the Herminghaus case:

> "Two answers might well be suggested to the claims of the defendants and of

their supporting amici curiae of a present right to thus break down and destroy the long-established doctrine of riparian rights upon the ground of public policy. One of these is to be found in the apt expression of our Chief Justice Shaw in his admirable review of the *Development of the Law of Waters in the West* above referred to, wherein he says:

"'The obvious answer on the question of policy is that the objection comes too late, that it should have been made to the Legislature in 1850, prior to the enactment of the statute adopting the common law. When that was done, the riparian rights became vested, and thereupon the much more important public policy of protecting the right of private property became paramount and controlling. This policy is declared in our constitutions, has been adhered to throughout our national history, and it is through it that the remarkable progress and development of the country has been made possible.'

"And the other equally apt answer is to be found in the opinion of Mr. Justice Sloss in the case of Miller & Lux v. Madera Canal, etc. Co." (155 Cal. 59), "wherein that learned jurist said:

"'The riparian owners have a right to have the stream flow past their land in its usual course, and this right, so far as it is of regular occurrence and beneficial to their land is, as we have frequently said, a right of property, "a parcel of the land itself." Neither a court nor the Legislature has the right to say that because such water may be more beneficially used by others it may be freely taken by them. Public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation. If the higher interests of the public should be thought to require that the water usually flowing in streams of this State should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain. The argument that these waters are of great value for the purposes of storage by appropriators and of small value to the lower riparian owners defeats itself. If the right sought to be taken be of small worth, the burden of paying for it will not be great. If, on the hand, great benefits are conferred upon the riparian lands by the flow, there is all the more reason why these advantages should not, without compensation, be taken from the owners of these lands and transferred to others.'"

The arguments of the second class, viz., those on the legal question as to whether or not riparian rights have been or can be limited require more extended discussion.

It is obvious that the view that no limitation has been or can be imposed, rests on the proposition that, upon the creation of the State of California, riparian rights attached to all lands in the State through which waters flowed, and that they then became vested property rights which cannot be taken away at all for private use, or without compensation and due process of law even for public use. The advocates of the limitation theory of course do not dispute the proposition that vested property rights cannot be taken away except upon compensation and by due process of law, but rely upon two main theories, viz.,

First, That of the adaptibility of the common law to changed conditions, and

Second, That the limitation of riparian rights is a proper exercise of the police power.

The rule that the common law is not an immutable, unchangeable thing, but adapts itself to changing conditions, is fully recognized both in England and in the United States. A striking instance of the application of the rule in this State is to be found in the case of Katz v. Walkinshaw, 141 Cal. 116, which was to the law of underground waters what Lux v. Haggin was to the law of riparian rights. In Katz v. Walkinshaw the Supreme Court, speaking through Mr. Justice (later Chief Justice Shaw), discussed at length the adaptibility of the common law to changed conditions, and by reason of the totally different conditions obtaining in California, held that the common law rule as to underground waters never had been the law in California, and applied to such waters a rule analogous to the law of riparian rights, giving to the overlying land owners a correlative right to the use of the waters, based on reasonable use by each, but departing from the analogy and following the law of appropriation to the extent of recognizing the right to divert for distant use after the reasonable uses of the overlying owners were supplied.

This rule was also fully discussed by Mr. Justice Shenk in his dissenting opinion in the Herminghaus case.

The arguments for the application of this rule of adaptability to the limitation of riparian rights seem to take two forms.

The first form is the argument that it can be held as to riparian rights (as was done in Katz v. Walkinshaw with respect to underground waters) that the common law rule, or so much of it as may be inconsistent with the limitation proposed, never was the law of California, because of its unsuitability to the local conditions.

The second form of the argument accepts the proposition that by the adoption of the common law the English rule of riparian rights was in full force for many years, but suggests that the adaptability of the common law to changed conditions has in recent years worked an automatic change in the law, so that the limitation of riparian rights to reasonable use has come about to meet present day conditions, and needs but to be declared and enforced by the courts.

The first form of this argument if adopted by the Supreme Court would involve the overruling of Lux v. Haggin and all the cases which have followed it. It would escape the theory of vested rights by saying that there never were such rights under the law, but it seems impossible to escape the rules of res judicata and stare decisis. The former would preclude relitigation of all titles actually litigated, and the latter would demand its application to prevent the unsettling of titles to all riparian lands in the State. Even if the court should take the position that from the time of Lux v. Haggin to the present it had been wrong the fact would remain that riparian rights had actually been recognized for more than forty years, and the rule laid down in that case has become a recognized rule of property.

In Katz v. Walkinshaw it appeared that the earlier decisions with respect to underground waters had been in great conflict, and it was because there was no well settled rule of property that the court felt free to hold that the common law rule as to underground waters had never been in force in California. It may be that the Supreme Court might at the time of deciding Lux v. Haggin have refused to recognize the common law rule of riparian rights, as not being adapted to the conditions in this State, but to do so now after the rule has been uniformly recognized for forty years would be an entirely different thing.

The second form of the argument seems to meet an equally insurmountable obstacle, viz., the rule that while the common law changed to meet changed conditions, such changes did not divest vested property rights. If it be true that upon the creation of the State, riparian rights attached to all lands through which streams flowed, all possible riparian rights were eo instante vested rights, and even conceding that the law thereafter changed by reason of its adaptability to new conditions, it would not seem to follow that these vested rights would be thereby lost or diminished. Indeed it is obvious that the Legislature could repeal the law of riparian rights, for it can change the common law as well as its own statute law, but by so doing it could not affect vested right. This very point was considered by the Supreme Court in the recent Fall River case hereinabove cited, where the court said:

> "No question can arise as to the power of the Legislature to modify or abrogate a rule of the common law. The question is: Can any such change affect the previously vested rights of property owners? We need here only say that the legislative department of the State may not take any portion of a vested property right from one person and invest another with it and be justified in so doing, in view of the provisions of sections 13 and 14 of Article I of the State Constitution and the Fourteenth Amendment to the Constitution of the United States."

Turning now to the arguments based on the theory that the limitation of riparian rights is a proper exercise of the police power, it is of course apparent that a discussion of the principles relating to the police power might be expanded to almost any extent. It seems enough to say that the theory that riparian rights can be limited by the Legislature was carefully considered in both the Herminghaus case (73 C. D. 23-25, 252 Pac. 621-623) and the Fall River case (74 C. D. 282-283, 259 Pac. 449-450). In each case it was held that limitations attempted to be imposed by the Water Commission Act, similar to those attempted to be imposed by the proposed amendment, were invalid.

Inasmuch as the constitutional principle involved is one that finds expression in the Federal Constitution the fact that the proposed amendment is one to the Constitution and not an act of the Legislature does not save it.

It is true that in the Herminghaus case the court in discussing the police power was doing so with reference to section 42 of the Water Commission Act, which purported to set two and a half acre feet per year per acre for uncultivated areas as the definite limit of beneficial use, and used some language which might be understood as implying that they might have reached a different conclusion if, as in the case of the proposed amendment, the limitation had simply been to "reasonable use," leaving the question as to what was reasonable use to be determined by the courts under the facts of each case, but in the Fall River case the court was considering section 11 of the Water Commission Act, which is just as general in its expressions as the proposed amendment.

It is also true that in each case the court intimated that conceivably a case might arise which would admit of invoking the police power. The later Fall River case quoted what was said in the Herminghaus case, and amplified the comments, as follows:

"'We are by no means intended to say that riparian rights may not under proper circumstances yield to the police power in the interest of public health, safety, comfort or welfare, but the Act of June 16, 1913, does not purport to be an exercise of such power for any purpose nor do the facts in the present case give rise to a situation where the police power may operate. See Herminghaus v. Southern California Edison Company, supra, where we said:

"'If the State were here essaying to uphold an effort on its part to work out impartially, unselfishly and in the interests of the whole people some general plan or system for the equitable adjustment of rights and uses in its flowing streams with a view to the conservation, development, and distribution of the dynamic forces and generative and fertilizing fructibilities of their waters, it might well be argued that public policy, public interest, and a most liberal interpretation of the police powers of the State might rightfully be invoked in support of such an effort. But can the same be properly said or claimed in a case wherein one or many privately owned and operated institutions, organized primarily for personal and private gain, and only incidentally and secondarily assuming to act in the public interest and welfare, are engaged in controversies in the courts with other private individuals or associations over the asserted and disputed property rights and interests of each of the respective parties to such controversies? We do not feel called upon in this case to so declare.'"

It seems fairly clear that the proposed Constitutional amendment does not meet the requirements which the court had in mind as justifying resort to the police power, for it goes no further than the Water Commission Act attempted to do, stopping at a limitation of the riparian right, presumably so that the surplus may be claimed by any appropriator—the very thing which the Supreme Court in the two cases referred to said could not be done without the impairment of vested rights.

The third argument, viz., that even if the amendment cannot of itself work a limitation, it is nevertheless desirable that it should be adopted, as an expression of popular opinion, helping to mold the law, is apparently based upon the view expressed by Wiel and quoted near the beginning of this report that:

> "* * * * * the Western law of waters is in a state of evolution in which legal formulas, whichever of the two one may adopt as theoretically the right one, are not of greatest importance; for the law will eventually work itself out according to the attitude of the people, whatever way that may finally become settled hereafter."

It is argued that this proposed declaration of policy will work toward a change and some state in this connection that the rule of adaptability of the common law will, as it were, co-operate with the amendment, if adopted, to pave the way for some limitation of riparian rights.

Against this it is argued that the much vexed and long debated question of limitation of riparian rights has probably been set at rest by the Herminghaus and Fall River decisions, and that the adoption of the amendment will give rise to much further litigation, but without much hope of accomplishing the apparently generally desired limitation.

In conclusion, the writer wishes to say that he has attempted to study this question with an open mind. Had he permitted his personal leanings to influence him, they would have tended toward a conclusion contrary to that which he has reached, for he has in the past believed that some limitation of riparian rights was desirable, and some of his most respected friends are among the advocates of the adoption of the measure.

The conclusion seems to the writer to be unescapable that if the measure means anything, it means taking part of the vested property right of the riparian proprietor. If it be true that the riparian right is part and parcel of the land itself, as is firmly established, then it must be true that a constitutional amendment limiting the right to reasonable and beneficial use is indistinguishable in point of law from one which in terms said that the right to lands should be limited to such as should be reasonably and beneficially used. Having in mind this rule that the riparian right is part and parcel of the land, the writer may thus paraphrase the second sentence of the proposed amendment without any change whatever in its meaning:

> "The right to land in this State is and shall be limited to such land as shall be reasonably required for the beneficial use to be served * * * * *."

If the Constitution can forfeit for non-use any part of the riparian right (which is part and parcel of the land), it can likewise forfeit any part of the area of any land in the State which is not put to beneficial use.

If the courts open the door to legislative or constitutional enactments contemplating the taking away of even the smallest or least valuable part of a man's private property, where is it to end?

If a declaration by a majority of the voters voting at an alection that the general welfare requires that the water resources be put to beneficial use justifies taking any part of the riparian right, i. e., the land, would not a declaration that the public welfare requires the equal per capital distribution of all the wealth of the inhabitants of the State equally justify the taking of all such wealth?

It is not unreasonable to believe that such an amendment might be proposed at any time in these days of unrest, nor is it improbable that if proposed it would be adopted, and then only the Federal Constitution and our courts would stand between it and the wrecking of all our institutions, for such a confiscation of wealth would be repugnant to the foundation principles of our economic structure.

The various "single tax" amendments which have been voted on in recent years have been rejected principally because they work to impose a penalty on the land owner who does not put his land to beneficial use. If that is repugnant to our principles, it surely is far more so to take away and give to others that part of the land which is not put to beneficial use.

It is recommended that the Los Angeles Bar Association disapprove Assembly Constitutional Amendment No. 27.

(The foregoing report was approved by the Committee on Constitutional Amendments, and the adoption of the proposed Amendment No. 27 disapproved.)

LAWYER'S RESPONSIBILITY UNDER STATE BAR ACT

(Continued from page 20)

the next task before the Board is to make every member of the profession realize that the State Bar is his organization, that he is an integral part of it, that every problem confronting the profession is his problem, that his problem is our problem, whether he practices in the rural districts or in the metropolitan centers.

Another important question is that of qualifications for admission to pratice, so important that the Board of Governors intends moving slowly and cautiously; it is collecting data, but no action will be taken until all available facts have been compiled and carefully considered.

We older men in the profession have fought and still are fighting for our ideals, but upon you younger men and women rests the grave responsibility of carrying out these cherished ideals, for this movement is a matter of growth and we cannot expect more than to lay the foundation for this work in the brief time allotted to us. We hope, we know, that among you there are many who have a genuine passion for service in a noble cause, and with this hope we welcome you into our profession.

Book Reviews

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PUBLIC UTILITY LAW, STATE AND FEDERAL; Harvey E. Wood; 1926; xxi and 772 pages; Vernon Law Book Company, Kansas City, Mo.

The author of this one-volume book it counsel for the Illinois Commerce Commission and his work reflects his practical experience and pragmatic attitude. Its subject matter embraces all controversies which could come before such a commission and the adjudications made as a result by such a body and by State and Federal courts have been collected, organized and systematized to form the present volume. With this in mind, and remembering what every school boy knows—that Illinois is the hub of the railroad industry, a guessing contest to ascertain the principal kind of public utilities with which the author is concerned, would not be a protracted affair. By far the greater part of the book deals with Railroads and gives decisions discussing such details as Bills of Lading, Stocks and Bonds, Convenience and Necessity, Interstate and Intrastate Commerce, Rate Fixing, Valuation, and kindred subjects. The matters discussed are gone into with satisfying fullness and the Federal acts, such as the Carmack Amendment of 1906, the Elkins and the Hepburn Acts are adequately handled. The chapters on Rates and Valuation give an especially thorough treatment of these oft-times vexing subjects. However, public service companies such as gas, electric, and water companies are mentioned only superficially and municipally owned utilities, as such, are accorded little more attention.

The book, as the author himself states, is in form a brief of the leading cases decided on the various points. It is not in the usual text-book style but follows the legal brief form with a condensation or head-note of a case being given under the proper subject classification, immediately followed by the citation of the case. Such a form has its advantages in that it enables the compiler to pack all the actual "meat" into his literary knapsack and dispense with a great deal of surplusage. The reading of the decisions in actual controversies enables the searcher to obtain the actual status of the law readily and with the least amount of search. But, to the writer's mind, the disadvantages of the system adopted by Mr. Wood are by no means unsubstantial. Certainly such a "lay-out" can be of small use to a layman who knows little about legal briefs and less about their use. More than this, the average lawyer when he goes to a reference book on public utilities is anxious chiefly to seize upon some principle or policy of public utility law to help him and guide him to a proper perspective of his particular problem; he himself is then content to run down the cases. A bird's-eye view of the tendencies and inclinations of the law are most important to him. A rationalization of this immense and still-growing field of law is more to be desired than a compilation of the leading cases, valuable as the latter may be.

Public Utility Law contains much indispensable information on the subjects within its scope; it is most exhaustive and complete —all the leading cases being cited. Its value cannot be disputed and an attorney doing public utility work will find himself continually thumbing its pages. But when some wise man made the remark that there is nothing so good but it can be improved upon, he might well have had this present work in mind.

WILLIAM E. BALTER

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